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No. 97-1254

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PRACTICE MANAGEMENT INFORMATION CORPORATION,
Petitioner,

vs.

AMERICAN MEDICAL ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES

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LIST OF PARTIES TO THE PROCEEDINGS PURSUANT TO RULE 29.6

The List of Parties to the Proceedings is contained in the Petition for Writ of Certiorari filed with this Court on February 2, 1998.

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Pursuant to Supreme Court Rule 15.8, Petitioner Practice Management Information Corporation ("PMIC") respectfully submits this Supplemental Brief in response to the Brief for the United States as Amicus Curiae. *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE, § 6.39 at 377 (7th ed. 1993) (supplemental brief may be filed to respond to amicus brief of the United States).

I.
THE UNITED STATES IGNORES THE IMPORTANCE OF THIS CASE AND THE FEDERAL POLICY OF ADOPTING PRIVATELY WRITTEN STANDARDS AS LAW

The very first reason presented by PMIC for granting certiorari was the importance of the questions presented. *See* PMIC Pet. at 15-18. As PMIC explained, there has been a proliferation of privately drafted regulations, due in large part to a federal policy of adopting privately written standards as federal regulations whenever possible. OMB Circular No. A-119, 58 Fed. Reg. 57,643, 57,644-45 (1993). The Ninth Circuit's conclusion that these many regulations are protected by copyright, along with a similar decision by the Second Circuit, seriously threaten the public's right to publish the laws for the first time in 150 years.

The government's brief completely ignores the importance of the questions presented. The government does not discuss the widespread proliferation of privately drafted regulations. Nor does it discuss what impact, if any, resolution of this case could have on its policy of adopting privately written standards, or on the process of enacting regulations in general. Indeed, the government mentions its policy only in a footnote, without comment. Br. of United States at 2 n.2.

Moreover, the government's brief does not explain why it has implemented its policy in this case and in others at the expense of the public's right to publish the laws. The public's right would still be secure had the government purchased outright the copyrights in the CPT and in the other privately drafted works that the government has adopted into law. Indeed, this is the approach endorsed by the Senate a century ago.[1] Instead, the government has given the AMA the exclusive right to publish the federal regulations it has written, a right which ***prevents even the government itself from publishing those regulations.*** The government does not even attempt to justify this impairment of the public's longstanding right to publish the laws, or to downplay its importance.

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[1] As the Senate Committee on Printing explained in denouncing a private claim of copyright in a compilation of presidential papers:

> If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money frankly and properly appropriated for that purpose, and the resulting book or other publication in whole and as to any part should be always at the free use of the people, and this, without doubt, was what Congress intended.

S. Rep. No. 56-1473, at 2 (1st Sess. 1900).

II.
THE UNITED STATES DOES NOT CONFRONT THE CIRCUIT CONFLICT

The government asserts that the Ninth Circuit's decision in the present case and the Second Circuit's decision in *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994) (*CCC*), do not conflict with the First Circuit's decision in *Building Officials & Code Admin. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980) (*BOCA*). Br. of United States at 5, 9-11. However, the government's efforts to distinguish *BOCA* from the present case and from *CCC* are strained at best.

The government first asserts that the *BOCA* court merely "suggest[ed] some arguments both in favor of terminating the private author's copyright in the model code, and against that result." Br. of United States at 10 (citations omitted). This badly distorts the First Circuit's decision. The First Circuit could not have stated more clearly its view that copyright protection for privately drafted laws is contrary to the very concept of democratic government and violates Due Process. *BOCA*, 628 F.2d at 734-35 (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932), and *Banks v. West*, 27 F. 50, 57 (C.C.D. Minn. 1886)).

It is true that *BOCA* was decided on appeal from a preliminary injunction, and the First Circuit refused to prejudge any appeal from a final judgment. *Id.* at 736. That, however, does not lessen the circuit conflict or undermine the reasoning or holding of the First Circuit.

The government next asserts that *BOCA* is distinguishable because "PMIC does not seek merely to reproduce 'an official copy' of the text of a statute that has been enacted into law or regulations that have been duly promulgated." Br. of United States at 10. PMIC is at a loss to understand this proposed distinction. PMIC does indeed seek merely to reproduce "an official copy" of a regulation that has been enacted into law – the CPT. That the CPT is published by the AMA, not the government, does not make it any less "official," nor distinguish this case from *BOCA* which involved a privately published work. *BOCA*, 628 F.2d at 732.[2]

In a related argument, the government asserts that *BOCA* is distinguishable because the AMA "has never permitted the copyrighted work itself to be reproduced as a federal statute or regulation." Br. of United States at 11. However, the AMA's refusal to permit even the government to reproduce the CPT – in the *Federal Register*, the *Code of Federal Regulations*, or anywhere

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[2] The government's argument may be based upon a misunderstanding of the facts of this case. The government apparently believes that PMIC plans to modify the CPT. Br. of United States at 3, 9 n.12. This perhaps forms the basis for the government's claim that PMIC does not wish to create "an official copy" of the CPT. PMIC, however, does not plan to modify the CPT. At most, PMIC would correct obvious typographical errors (*see* Clerk's Record 10 ¶ 36); and PMIC would gladly not do so if this Court concluded that such corrections were for some reason impermissible.

else – serves only to enhance the importance of the public's right to publish in this case.[3]

Next, the government argues in a footnote that *BOCA* is distinguishable because the *BOCA* regulations "carr[ied] sanctions of fine and imprisonment for violations." Br. of United States at 11 n.14. This argument is meritless because the present case is no different. As PMIC explained in its Petition, the *Health Insurance Portability and Accountability Act of 1996*, Pub. L. No. 104-191, 110 Stat. 2021 (1996), 42 U.S.C. § 1320d *et seq.*, imposes fines upon any Medicare or Medicaid participant who fails to comply with the "standards" adopted by HCFA, including the CPT. *See* PMIC Pet. at 9; 42 U.S.C. § 1320d-5(a) (Supp. 1997).

Finally, in an effort to avoid the circuit conflict, the government improperly rewrites the first question presented. The United States asserts that the issue before this Court is whether a "work that is ***refered to*** in federal regulations" loses copyright protection, or whether "the ***incorporation by reference*** of the CPT into federal regulations" ends the AMA's copyright in the CPT. Br. of United States at 7, 11 (emphasis added). *See also id.* at 7-8 (quoting a copyrighted work in a judicial opinion does not terminate the copyright). However, the question actually before this Court is whether a private author may enforce a copyright in a work which has been ***adopted***

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[3] The government's argument is also factually inaccurate. The AMA has permitted the government to reproduce all 5,000+ CPT code numbers (but not the entire corresponding medical descriptions) as part of the Medicare Fee Schedule. The government publishes the Medicare Fee Schedule annually in the *Federal Register*. *See, e.g.*, 61 Fed. Reg. 59,490, 59,556-712 (1996).

into law. *See* PMIC Pet. at i. That is the issue which the Ninth Circuit addressed below,[4] and that is the issue which PMIC raised in its Petition. *Id.* at i, 15-24. The government has provided no basis for its recharacterization of the issue before this Court, and there is none.

III.
THE UNITED STATES PROVIDES NO REASON IN LAW OR POLICY FOR REJECTING THE FIRST CIRCUIT'S DUE PROCESS ANALYSIS AND ALLOWING THE NINTH CIRCUIT'S DECISION TO STAND

As explained in PMIC's Petition, the First Circuit in *BOCA* provided a detailed explanation of why a copyright in privately drafted laws is contrary to basic democratic principles and Due Process. *See* PMIC's Pet. at 18-21. Indeed, the First Circuit's decision contains the most thorough analysis of this issue in any judicial opinion.

The government's brief does not identify a single flaw in the First Circuit's analysis. Indeed, the government does not even expressly state that it disagrees with the First Circuit's decision. Instead, the government advances its own unsupported theory of Due Process

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[4] Specifically, the Ninth Circuit described the issue of first impression now facing this Court as follows:

> The Supreme Court has not considered a case in which the author asserted a proprietary interest in material adopted by the government as law.

A8-A9.

which does not even speak to the question presented in this case.

Specifically, the government asserts that "due process turns on whether the law is available to all those governed by it, not on the number of sources from which it is available." Br. of United States at 8. This argument misses the point. The issue here is not whether Due Process requires multiple publishers for all laws. Rather, the issue is whether ***the government*** may, through the copyright laws and by contract, affirmatively limit publication and distribution of the laws to a single source. *BOCA* held that this violates Due Process and basic principles of democratic government. *BOCA*, 628 F.2d at 734-35. The government has provided no argument to the contrary. The government's inability to find any flaw in the First Circuit's reasoning confirms that the First Circuit, not the Ninth Circuit, has correctly analyzed this important issue, and that this Court should grant certiorari to resolve this circuit conflict.

IV.
IN DISTINGUISHING *BANKS v. MANCHESTER*, THE UNITED STATES MISCHARACTERIZES PMIC'S REASONS FOR GRANTING CERTIORARI

The government asserts that "PMIC places primary reliance on *Banks v. Manchester*, 128 U.S. 244 (1888)." Br. of United States at 6. The government then argues at length that *Banks* is factually distinguishable from the present case. *Id.* at 6-8.

The government's efforts to distinguish *Banks* are entirely misplaced. PMIC never placed "primary reliance" on *Banks* and never asserted that *Banks* is controlling here.

To the contrary, PMIC argued that the absence of a controlling Supreme Court precedent on an important point of law which has divided the circuit courts is an affirmative reason for granting certiorari. PMIC Pet. at 15-22.

Indeed, PMIC emphasized the very point argued by the government – that "[t]his Court has never been confronted with a case in which a private author has asserted a copyright in the laws it has written." *Id.* at 18. In distinguishing *Banks* factually, the government has merely confirmed what is undisputed.

In addition, the government's attempt to limit *Banks* to its facts, without consideration of its reasoning, would invite evasion of *Banks* and the public's right to publish laws and regulations. Under the government's view, whenever the government assigns the task of drafting regulations to a private party, rather than a government employee, the public has no right to publish the resulting regulations. Surely, something as fundamental as the public's right to publish laws and regulations cannot depend upon a distinction as technical and fleeting as the author's status as an independent contractor or an employee. Yet, the government and the Ninth Circuit believe that it does.

V.
THE UNITED STATES FAILS TO EXPLAIN HOW THE CPT COPYRIGHT SURVIVES UNDER THE MERGER DOCTRINE

In its Petition, PMIC argued that a law can be expressed in only one way and, therefore, any purported copyright in a law is necessarily invalid under the merger doctrine of copyright law. PMIC Pet. at 23-24. The

government's only response is its bald assertion that a merger cannot invalidate a copyright unless the merger occurs at the time the work is first written. Br. of United States at 15.

The government's argument is meritless. First, the government cites no authority for its interpretation of the merger doctrine. Second, the government makes no attempt to reconcile its time-sensitive view of the merger doctrine with the basic merger principles recited in PMIC's Petition. Finally, the government makes no attempt to explain how a copyright in the law, which necessarily must be written in only one way, can possibly be consistent with the merger doctrine.

VI.
THE UNITED STATES HAS FAILED TO EXPLAIN HOW A WORK ESSENTIAL TO THE OPERATION OF THE GOVERNMENT'S MEDICAL REIMBURSEMENT SYSTEM IS NOT A SYSTEM UNDER 17 U.S.C. § 102(b)

The government concedes that "[t]he CPT may indeed be essential to the operation of the government's medical reimbursement system." Br. of United States at 13. In view of this concession, its assertion that the CPT is not a system under 17 U.S.C. § 102(b) is untenable.

As the government recognizes, Section 102(b) embodies the foundational restrictions on copyright first recognized by this Court in *Baker v. Selden*, 101 U.S. 99 (1880). There, this Court held that a system of bookkeeping, ***and the forms necessary to use the system***, were beyond the scope of copyright protection. *Id.* at 104-05, 107. Because the CPT is concededly essential to the operation of the government's medical reimbursement

system, the AMA's copyright in the CPT is necessarily invalid.

The government criticizes PMIC for overstating the Ninth Circuit's holding rejecting PMIC's Section 102(b) argument. PMIC, however, did not and for that reason specifically limited its second question presented to privately written reference works which have been adopted as official legally mandated systems. PMIC Pet. at i. Those are the very circumstances which the government concedes are present, and which the Ninth Circuit directly addressed. A11 n.8. Thus, the second question presented is squarely before this Court.

CONCLUSION

The government has not rebutted PMIC's reasons for granting its Petition for Writ of Certiorari. It has ignored the importance of the questions presented, and has failed to reconcile the conflict between the First, Second, and Ninth Circuits. Accordingly, this Court should grant PMIC's Petition.

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